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## The Terrorist Surveillance Program: Assessing the Legality of the Unknown

**Abstract:** The Bush administration established the Terrorist Surveillance Program to conduct electronic surveillance on communications between suspected terrorists. Many advocacy groups, scholars, and journalists declared that the Terrorist Surveillance Program was unconstitutional and violated the Foreign Intelligence Surveillance Act. For over a year, the Bush administration vehemently denied these claims and defended the program as a constitutional exercise of the president's power. After a federal district court ruled that the Terrorist Surveillance Program was unconstitutional, the United States Court of Appeals for the Sixth Circuit vacated the lower court's opinion and remanded the case for dismissal on the grounds of standing. Despite the Sixth Circuit's decision, the administration terminated the program in January 2007 in response to public pressure.

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## I. INTRODUCTION: THE "TERRORIST SURVEILLANCE PROGRAM"

On December 16, 2005, The New York Times revealed that the Bush administration authorized the National Security Agency ("NSA") to conduct warrantless surveillance on Americans.<sup>1</sup> The administration termed this practice—somewhat controversially—the Terrorist Surveillance Program ("TSP").<sup>2</sup> Although the program's specifics remain a secret, reports indicate that the surveillance possibly began as early as February 2001.<sup>3</sup> On January 17, 2007, Attorney General Alberto Gonzales wrote a letter to the Senate Judiciary Committee and reported that the administration would stop the program.<sup>4</sup> The administration had to abide by the Foreign Intelligence Surveillance Act ("FISA") after it abandoned the TSP.<sup>5</sup> Under intense pressure from the White House, Congress amended FISA in August 2007 to make it easier for the executive branch to obtain wiretaps.<sup>6</sup>

The TSP targeted cross-border phone and e-mail communications between persons or organizations in the United States and abroad.<sup>7</sup> The operational details of the TSP are unknown, but it is understood that the NSA had the authority to conduct wiretaps if it suspected an overseas call or e-mail involved persons or organizations linked to al

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<sup>1</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>2</sup> John Diamond & David Jackson, *Surveillance Program Protects Country, Bush Says*, USA TODAY, Jan. 23, 2006, [http://www.usatoday.com/news/washington/2006-01-23-bush\\_x.htm](http://www.usatoday.com/news/washington/2006-01-23-bush_x.htm).

<sup>3</sup> Andrew Harris, *Spy Agency Sought U.S. Call Records Before 9/11, Lawyers Say*, BLOOMBERG.COM, June 30, 2006, <http://www.bloomberg.com/apps/news?pid=20601087&sid=abIV0cO64zJE&refer>.

<sup>4</sup> Letter from Alberto Gonzales, Att'y Gen of the United States, to Patrick Leahy, Chairman, S. Judiciary Comm., and Arlen Specter, Ranking Minority Member, S. Judiciary Comm. (Jan. 17, 2007), available at <http://jurist.law.pitt.edu/pdf/fiscletter.pdf> [hereinafter *AG Letter*].

<sup>5</sup> See Paula Wolfson, *Bush Urges Action on Terrorist Surveillance Legislation*, VOICE OF AMERICA, Aug. 1, 2007, <http://www.voanews.com/english/2007-08-01-voa58.cfm>; see also Chip Pitts, *The End of Illegal Domestic Spying? Don't Count on It*, WASH. SPEC., Mar. 15, 2007, [http://www.washingtonspectator.com/articles/20070315surveillance\\_1.cfm](http://www.washingtonspectator.com/articles/20070315surveillance_1.cfm).

<sup>6</sup> Ellen Nakashima & Joby Warrick, *House Approves Wiretap Measure*, WASH. POST, Aug. 5, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/04/AR2007080401744.html?hpid=topnews>.

<sup>7</sup> Risen & Lichtblau, *supra* note 1.

Qaeda.<sup>8</sup> Many scholars debated the program's legality in light of FISA and constitutionality with regards to the First Amendment, the Fourth Amendment, and the scope of the executive's Article II powers.<sup>9</sup> Congress intended FISA to serve as the "exclusive means by which electronic surveillance . . . may be conducted."<sup>10</sup> Judge Taylor, a federal district court judge, argued that the TSP circumvented the procedures established in FISA; therefore, by acting outside of FISA, the program was illegal.<sup>11</sup> Although the United States Court of Appeals for the Sixth Circuit eventually overturned Judge Taylor's decision, her opinion provoked a maelstrom of responses.<sup>12</sup> This outbreak of public response motivated members of Congress to propose several pieces of legislation addressing the controversial program.<sup>13</sup> Ultimately, the Bush administration abandoned the TSP

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., John Cary Sims, *What NSA is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006).

<sup>10</sup> 18 U.S.C. § 2511(2)(f) (2000).

<sup>11</sup> *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006), *vacated* 493 F.3d 644 (6th Cir. 2007) ("In this case, the President has acted, undisputedly, as FISA forbids.") [hereinafter *ACLU I*].

<sup>12</sup> See, e.g., Curtis A. Bradley et al., *Jan. 9, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Letter of Dec. 22, 2005*, 81 IND. L.J. 1364 (2006), available at <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf>; PETER SWIRE, CTR. FOR AM. PROGRESS, LEGAL FAQs ON NSA WIRETAPS, (2006), [http://www.americanprogress.org/kf/nsa\\_wiretaps.pdf](http://www.americanprogress.org/kf/nsa_wiretaps.pdf); but cf. Letter from John Eastman, Dir., Claremont Institute's Ctr. for Constitutional Jurisprudence, to James Sensenbrenner, Jr., Chairman, H. Judiciary Comm. (Jan. 27, 2006), available at <http://judiciary.house.gov/media/pdfs/nsaeastmanltr.pdf>; Testimony of Robert Turner, Assoc. Dir. of the Ctr. for Nat'l Sec. Law, University of Virginia, before the S. Judiciary Comm. (Mar. 31, 2006), available at [http://judiciary.senate.gov/testimony.cfm?id=1841&wit\\_id=5217](http://judiciary.senate.gov/testimony.cfm?id=1841&wit_id=5217); David Yerushalmi, *Politics or National Existence? Choose or Perish.*, THE INST. FOR ADVANCED STRATEGIC & POLITICAL STUDIES WEEKLY ESSAYS, Dec. 28, 2005, [http://www.iasps.org/opeds/show\\_article.php?lang=2&main=&type=4&article\\_id=503](http://www.iasps.org/opeds/show_article.php?lang=2&main=&type=4&article_id=503); Letter from Caroline Fredrickson, Dir., Washington Legislative Office of the ACLU, to Members of the Senate (Mar. 16, 2006), available at <http://www.aclu.org/safefree/general/24623leg20060316.html>; ACLU, *Senate Judiciary Committee to Blindly Consider NSA Legislation, Fails to Challenge White House Claims of Unlimited Executive Power*, June 8, 2006, <http://www.aclu.org/safefree/general/25810prs20060608.html>; Eric Lichtblau & David Johnston, *Court to Oversee U.S. Wiretapping in Terror Cases*, N.Y. TIMES, Jan. 18, 2007, at A1.

while a Democrat-controlled Congress amended FISA to provide the executive branch greater power to conduct surveillance.<sup>14</sup>

## II. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

In 1978, Congress passed FISA to define the parameters of permissible government surveillance of U.S. residents.<sup>15</sup> The TSP's critics assert that the program "clearly" side-stepped the legally mandated procedures FISA established for government surveillance.<sup>16</sup> The Bush administration counters that Congress never intended FISA to be a permanent check on the president's electronic surveillance capabilities. Additionally, the administration posits that Congress amended FISA through the Authorization for Use of Military Force ("AUMF"), which permitted the president to conduct warrantless surveillance.<sup>17</sup> Legal commentators have criticized these arguments raised by the Bush administration.<sup>18</sup>

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<sup>13</sup> See, e.g., Katherine Shrader, *Senators Question Gonzales on NSA Wiretaps*, BOSTON GLOBE, Feb. 6, 2006, [http://www.boston.com/news/nation/washington/articles/2006/02/06/senators\\_have\\_tough\\_questions\\_for\\_gonzales/](http://www.boston.com/news/nation/washington/articles/2006/02/06/senators_have_tough_questions_for_gonzales/); Letter from Dianne Feinstein, et al., U.S. Senators, to Members of the Senate (Dec. 20, 2005), available at <http://feinstein.senate.gov/05releases/r-i-spying.htm>; Dianne Feinstein, *Senate Judiciary Committee Approves Feinstein-Specter Bill Reaffirming FISA as the Exclusive Means for Domestic Electronic Surveillance*, Sept. 13, 2006, <http://feinstein.senate.gov/06releases/r-fisa-commte.htm>.

<sup>14</sup> Nakashima & Warrick, *supra* note 6.

<sup>15</sup> S. REP. NO. 95-604, at 15 (1978).

<sup>16</sup> SWIRE, *supra* note 12, at 1. See Brian R. Decker, Comment, "The War of Information": The Foreign Intelligence Surveillance Act, Hamdan v. Rumsfeld, and the President's Warrantless-Wiretapping Program, 9 U. PA. J. CONST. L. 291, 315-20 (2006); see also Sims, *supra* note 9, at 140.

<sup>17</sup> U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa1906wp.pdf> [hereinafter *White Paper*].

<sup>18</sup> See, e.g., SWIRE, *supra* note 12, at 9; Sims, *supra* note 9, at 130-33; Decker, *supra* note 16, at 321-33.

## A. HISTORY AND STATUTORY PROVISIONS OF FISA

The Nixon administration used warrantless wiretaps in 1968 to gather information on members of the White Panther Party for its alleged role in the bombing of Central Intelligence Agency offices in Ann Arbor, Michigan.<sup>19</sup> The government's attempt to use warrantless wiretaps in this domestic national security case was blocked by District Judge Keith's *United States v. Sinclair* decision.<sup>20</sup> The government challenged Judge Keith's judgment in *United States v. U.S. District Court (Keith)*.<sup>21</sup> The government argued that in cases of national security, warrantless wiretaps are permissible in light of the president's constitutional obligation to ensure national security.<sup>22</sup> The Supreme Court rejected the government's argument,<sup>23</sup> but explicitly limited its holding to instances of domestic security.<sup>24</sup> Thus, the Court left the door open for a subsequent determination of the proper "scope of the President's surveillance power with respect to activities of foreign powers, *within* or without this country."<sup>25</sup>

In the wake of *Keith*, Congress enacted FISA "to provide the secure framework by which the executive branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this nation's commitment to privacy and individual rights."<sup>26</sup> The plan enacted in FISA was a direct reflection of the Supreme Court's suggested remedy to the situation it encountered in *Keith*.<sup>27</sup> Consequently, while the statutory landscape

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<sup>19</sup> *Turmoil on Taps*, TIME, Mar. 6, 1972, <http://www.time.com/time/magazine/article/0,9171,910229-1,00.html>; posting by Spencer Overton to Blackprof.com, [http://www.blackprof.com/archives/2005/12/judge\\_damon\\_j\\_keith\\_no\\_warrant.html](http://www.blackprof.com/archives/2005/12/judge_damon_j_keith_no_warrant.html) (Dec. 18, 2005, 16:21 EST).

<sup>20</sup> *United States v. Sinclair*, 321 F. Supp. 1074, 1080 (E.D. Mich. 1971) (holding that in wholly domestic cases the Fourth Amendment's warrant requirement cannot be circumvented because of national security).

<sup>21</sup> *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972).

<sup>22</sup> *Id.* at 310–11.

<sup>23</sup> *Id.* at 323–24.

<sup>24</sup> *Id.* at 321–22.

<sup>25</sup> *Id.* at 308 (emphasis added).

<sup>26</sup> S. REP. NO. 95-604.

<sup>27</sup> Sims, *supra* note 9, at 109.

governing electronic surveillance has evolved since the Supreme Court's opinion in *Keith*, the Court's holding remains good law.<sup>28</sup>

Although Congress enacted FISA to contain the executive branch's use of electronic surveillance within constitutional boundaries, initially, some civil liberties activists proclaimed that the Act went too far.<sup>29</sup> Courts, however, consistently have found FISA constitutional because of the statute's requirement of judicial oversight of surveillance.<sup>30</sup>

FISA provides two exceptions that permit warrantless surveillance, neither of which would apply today. First, FISA permits warrantless surveillance of a foreign power for one year.<sup>31</sup> However, the definition of foreign power in this provision is extremely narrow and would not encompass terrorist organizations.<sup>32</sup> Additionally, in emergencies, the government may conduct warrantless surveillance for up to seventy-two hours without a court order.<sup>33</sup>

## B. CRITIQUES OF THE TERRORIST SURVEILLANCE PROGRAM

Despite the dearth of information regarding the TSP, commentators have frequently condemned the program as a violation of FISA.<sup>34</sup> These critics assert that the procedures codified in FISA represent the sole method through which the executive branch can conduct electronic surveillance, a relationship unchanged by subsequent legislation.<sup>35</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Appellee, *In re* Appeal from July 19, 2002 Opinion of the U.S. Foreign Intelligence Surveillance Court, (No. 02-001), available at <http://fas.org/irp/agency/doj/fisa/091902FISCRbrief.pdf>.

<sup>30</sup> See, e.g., *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997).

<sup>31</sup> 50 U.S.C. § 1802(a) (2000).

<sup>32</sup> 50 U.S.C. § 1802(a)(1)(A) (2000).

<sup>33</sup> 50 U.S.C. § 1805(f) (2000).

<sup>34</sup> See, e.g., *SWIRE*, *supra* note 12, at 6–7; *Sims*, *supra* note 9, at 140; *Decker*, *supra* note 16, at 315–20.

<sup>35</sup> See *SWIRE*, *supra* note 12, at 6–12; see also *Decker*, *supra* note 16, at 315–20.

It is generally accepted that the president has the power to conduct electronic surveillance.<sup>36</sup> However, this power is not unlimited: the Constitution serves as a fundamental check on the executive's power to conduct electronic surveillance.<sup>37</sup> Furthermore, Congress enacted FISA to regulate the executive branch's use of electronic surveillance when gathering foreign intelligence information.<sup>38</sup>

The real debate centers on the degree to which FISA regulates or limits the executive's power to conduct electronic surveillance. The U.S. Code explicitly states that FISA is "the exclusive means by which electronic surveillance . . . may be conducted."<sup>39</sup> In light of this language, critics argue that FISA regulations governed the activities conducted through the TSP.<sup>40</sup>

However, FISA contains a provision that permits Congress to amend the Act through subsequent legislation.<sup>41</sup> The Bush administration believes that, since Congress empowered the president to conduct the war in Afghanistan through the AUMF, it amended FISA by implication to allow the TSP.<sup>42</sup> However, critics deny the contention that the AUMF, or any other statute, has repealed the procedural constraints on electronic surveillance contained in FISA.<sup>43</sup>

In countering the president's claims, critics frequently employ a variety of interpretive tactics. Critics are quick to point out that the law disapproves of repeals by implication.<sup>44</sup> Commentators assert that Congress would not silently amend FISA through a statute that never once refers to the NSA, electronic surveillance of U.S. citizens, or

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<sup>36</sup> Sims, *supra* note 9, at 133–40.

<sup>37</sup> See *infra* Section III, for discussion of the constitutional limitations on the president's power to conduct electronic surveillance.

<sup>38</sup> S. REP. NO. 95-604, at 15 (1978).

<sup>39</sup> 18 U.S.C. § 2511(2)(f) (2000).

<sup>40</sup> See SWIRE, *supra* note 12, at 1–2; Decker, *supra* note 16, at 317.

<sup>41</sup> 50 U.S.C. § 1809 (2000).

<sup>42</sup> For more information, see *infra* Section II(c).

<sup>43</sup> See, e.g., SWIRE, *supra* note 12, at 1–2; Decker, *supra* note 16, at 321–33; Sims, *supra* note 9, at 130–33.

<sup>44</sup> See, e.g., SWIRE, *supra* note 12, at 11–12.

FISA itself.<sup>45</sup> In fact, Congress has amended FISA five times since the September 11th attacks without any mention of the AUMF.<sup>46</sup>

Critics also reject the administration's assertion that the AUMF impliedly repeals FISA based on a simple dissection of the plain meaning of the AUMF.<sup>47</sup> The AUMF authorizes the president "to use all necessary and proper force" to defend the U.S. against terrorists.<sup>48</sup> In *Hamdi v. Rumsfeld*, the administration convinced the Supreme Court that the detention of enemy combatants was a "necessary and appropriate force" to fighting a war.<sup>49</sup> Here, the administration arguably encounters more difficulty in characterizing electronic surveillance as "force."

The administration's attempts to broadly interpret the language of the AUMF appear to be inconsistent with Congress' intent. While the Court is not likely to consider congressional reaction, Congress' response to the TSP provides some evidence of congressional intent. Senator Tom Daschle stated that the government considered granting the president authorization to use "appropriate force *in the United States and* against those nations [that support terrorists]. . . ," before ultimately deciding to limit the authorization to "appropriate force against those nations."<sup>50</sup> Senator Daschle explained that the Senate rejected the former language because it "would have given the president broad authority to exercise expansive powers not just overseas—where we all understood he wanted authority to act—but right here in the United States."<sup>51</sup>

The *Hamdi v. Rumsfeld* decision could provide useful insight in grasping how the Supreme Court is likely to interpret the AUMF. In *Hamdi*, the Supreme Court interpreted the clause in the AUMF that authorizes the president "to use all necessary and appropriate force

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<sup>45</sup> See, e.g., Sims, *supra* note 9, at 132; Decker, *supra* note 16, at 323–24; SWIRE, *supra* note 12, at 6–7.

<sup>46</sup> Sims, *supra* note 9, at 132.

<sup>47</sup> SWIRE, *supra* note 12, at 7–12; Decker, *supra* note 16, at 321–22.

<sup>48</sup> Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>49</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>50</sup> Tom Daschle, Op-Ed., *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/22/AR2005122201101.html> (emphasis added).

<sup>51</sup> *Id.*



against those nations . . . he determines planned . . . the terrorist attacks.”<sup>52</sup> The Court held that the clause “necessary and appropriate force” provided the president with the authority to detain enemy combatants because the detention of troops was a “fundamental incident of waging war.”<sup>53</sup>

Some critics contend that the use of electronic surveillance is not a fundamental incident to war. On its face, a more likely interpretation is that the act of capturing a prisoner of war on the battlefield is far easier to classify as a “fundamental incident of waging war” than intercepting communication between U.S. citizens and suspected terrorists abroad.<sup>54</sup> Furthermore, wiretaps gather a broader range of information without discerning whether the content has any relation to national security.<sup>55</sup> The existence of a congressionally approved manner of using wiretaps necessitates the finding that this less discerning method of gathering information is not a “fundamental incident to war.”<sup>56</sup>

As previously noted, FISA contains two exceptions that provide conditions where the government may conduct electronic surveillance without first obtaining a warrant.<sup>57</sup> Some critics believe that the presence of the second exception reinforces the illegitimacy of the TSP. Suzanne Spaulding, who served as the executive director of the National Commission on Terrorism, noted:

FISA anticipates situations in which speed is essential. It allows the government to start eavesdropping without a court order and to keep it going for a maximum of three days. And while the FISA application process is often burdensome in routine cases, it can also move with remarkable speed when

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<sup>52</sup> See *Hamdi*, 542 U.S. at 510.

<sup>53</sup> *Id.* at 519.

<sup>54</sup> Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1252 (2006).

<sup>55</sup> Decker, *supra* note 16, at 325–28.

<sup>56</sup> *Id.*

<sup>57</sup> See *supra* text accompanying notes 19–33.

necessary, with applications written and approved in just a few hours.<sup>58</sup>

Additionally, the special court overseeing FISA warrants has been extremely accommodating over the years; through December 25, 2005, only four of 5,645 applications for warrants were denied.<sup>59</sup>

Critics contend that the collective weight of these arguments proves that Congress did not amend FISA through the AUMF. With FISA surviving without amendment, the TSP was subject to the procedural guidelines established in the Act. The TSP indisputably operated outside the FISA regulations; therefore, critics conclude that the program was a clear violation of federal law.

### C. FISA PERMITS THE TERRORIST SURVEILLANCE PROGRAM

In 2007, the Bush administration admitted that aspects of the TSP did not correspond with the procedures established in FISA.<sup>60</sup> The administration maintains, however, that the program was legal because FISA was amended to allow for the sort of surveillance that took place<sup>61</sup> or, alternatively, because FISA is unconstitutional.<sup>62</sup> FISA specifically provides for surveillance outside its established parameters if the surveillance is “authorized by statute.”<sup>63</sup> The Bush administration asserts that the AUMF authorizes electronic surveillance outside the scope of FISA.<sup>64</sup> Alternatively, the

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<sup>58</sup> Suzanne Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/12/23/AR2005122302050\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/12/23/AR2005122302050_pf.html).

<sup>59</sup> *Id.*

<sup>60</sup> AG Letter, *supra* note 4.

<sup>61</sup> U.S. DEP'T OF JUSTICE, THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS MYTH V. REALITY (Jan. 27, 2006), available at [http://www.usdoj.gov/opa/documents/nsa\\_myth\\_v\\_reality.pdf](http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf) [hereinafter *Myth v. Reality*]; Sims, *supra* note 9, at 133–34.

<sup>62</sup> *White Paper*, *supra* note 17, at 3.

<sup>63</sup> 50 U.S.C. § 1809 (2000).

<sup>64</sup> *White Paper*, *supra* note 17, at 2.

administration reasons that FISA unconstitutionally restricts the president's power if it precludes the TSP.<sup>65</sup>

On January 27, 2006, the Department of Justice released a memorandum stating that "[t]he President's authority to authorize the terrorist surveillance program is firmly based . . . in [the AUMF] passed by Congress after the September 11 attacks."<sup>66</sup> The AUMF grants the president the power to use "all necessary and appropriate military force" against those responsible for the attacks.<sup>67</sup> The Department of Justice claims that the expansive language employed by Congress carries significant meaning: "In the field of foreign affairs, and particularly that of war powers and national security, congressional enactments are to be broadly construed where they indicate support for authority long asserted and exercised by the executive branch."<sup>68</sup> Intelligence activities, in general, and wartime surveillance, in particular, are powers long asserted by the president and recognized by U.S. courts.<sup>69</sup>

In response to the argument disfavoring an implied amendment to FISA, the Department of Justice contends that the drafting of FISA evidences Congress's express allowance for implied repeals of FISA.<sup>70</sup> Congress broadly exempts electronic surveillance from FISA regulations when the surveillance is authorized by another statute.<sup>71</sup> In contrast, other FISA provisions strictly require an amendment to circumvent the regulations stipulated in the Act.<sup>72</sup> The Department of Justice reasons that Congress could not have intended the provision to encompass a narrow exception because they wrote 50 U.S.C. § 1809(a)(1) with expansive language; Congress surely knew how to draft a narrow provision and expressly chose not to do so.<sup>73</sup>

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<sup>65</sup> *Id.* at 29.

<sup>66</sup> *Myth v. Reality*, *supra* note 61.

<sup>67</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>68</sup> *White Paper*, *supra* note 17, at 11.

<sup>69</sup> *Id.* at 14–15.

<sup>70</sup> *Id.* at 20–21.

<sup>71</sup> 50 U.S.C. § 1809(a)(1) (2000).

<sup>72</sup> *White Paper*, *supra* note 17, at 21–24.

<sup>73</sup> *Id.* at 20.

The Department of Justice maintains that the AUMF impliedly grants the president the power to conduct electronic surveillance outside FISA's procedural constraints.<sup>74</sup> To reach this conclusion, the Department of Justice points to the AUMF's authorization for the president to use "all necessary and appropriate force."<sup>75</sup> In *Hamdi v. Rumsfeld*, the Supreme Court interpreted the breadth of this language.<sup>76</sup> The issue before the Court was whether the clause "necessary and appropriate force" provided the president with the authority to detain enemy combatants.<sup>77</sup> The Court held that detention of enemy troops is "an incident to war" and thus it classifies as "appropriate force" that the president is entitled to use.<sup>78</sup> The Department of Justice claims warrantless electronic surveillance is also "an incident to war" just like detention of enemy combatants.<sup>79</sup>

In short, the Department of Justice argues that Congress drafted FISA in a manner that permits implied amendments to the regulations established through the Act. The administration reads the Supreme Court's *Hamdi* opinion to authorize the president to conduct warrantless wiretaps. Therefore, the administration uses a liberal definition of "force" to conclude that Congress impliedly amended FISA through the AUMF.

### III. IS THE TERRORIST SURVEILLANCE PROGRAM CONSTITUTIONAL?

The Bush administration and critics of the TSP predictably differ as to the program's constitutionality. The Department of Justice warns that congressional intrusion into the President's implied power to gather intelligence could be unconstitutional.<sup>80</sup> Alternatively, critics assert that Congress operated within its constitutional power in

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<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 27.

<sup>76</sup> *Hamdi*, 542 U.S. at 507.

<sup>77</sup> *Id.* at 516–17.

<sup>78</sup> *Id.* at 518.

<sup>79</sup> *White Paper*, *supra* note 17, at 14–17 (The Department of Justice traces the historical use of spies and other forms of covert intelligence gathering to establish their finding that wiretaps are a "fundamental incident to war.").

<sup>80</sup> *Id.* at 28–36.

enacting FISA<sup>81</sup> and that the TSP raises First and Fourth Amendment issues.<sup>82</sup>

#### A. THE PRESIDENT'S ARTICLE II POWERS

The president's powers are established in Article II of the U.S. Constitution.<sup>83</sup> Among those powers granted to the president are the powers to act as the Commander-in-Chief of the Armed Forces and to tend to the United States' foreign affairs.<sup>84</sup> The Justice Department proposes that the duty to protect the U.S. from foreign enemies is entwined within these constitutionally-guaranteed powers.<sup>85</sup>

The right to collect intelligence follows the duty to protect the U.S. from its enemies: the president needs information to make informed decisions regarding matters of national security. The Supreme Court has frequently determined that the president has authority to employ espionage to gather information necessary to protect the country.<sup>86</sup> Consequently, the Bush administration has warned that any attempt to limit the president's power to obtain foreign intelligence could be an unconstitutional infringement on the executive's Article II power.<sup>87</sup>

Many critics maintain the TSP is unconstitutional despite the presidential power to guard the U.S. from foreign enemies.<sup>88</sup> Some dissenters doubt the administration's assertion that the Constitution grants the president the power to gather foreign intelligence;<sup>89</sup> however, even assuming that the administration does have this power, some critics argue that congressional authority to legislate in the field of foreign intelligence is well established.<sup>90</sup> Therefore, they insist

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<sup>81</sup> Sims, *supra* note 9, at 133–35; Decker, *supra* note 16, at 342.

<sup>82</sup> Decker, *supra* note 16, at 345.

<sup>83</sup> U.S. CONST. art. II.

<sup>84</sup> U.S. CONST. art. II, §2.

<sup>85</sup> *White Paper*, *supra* note 17, at 6–7.

<sup>86</sup> *Id.* at 7.

<sup>87</sup> *Id.* at 28–36.

<sup>88</sup> See, e.g., Bradley, *supra* note 12; Sims, *supra* note 9.

<sup>89</sup> See, e.g., SWIRE, *supra* note 12, at 14–15.

<sup>90</sup> Decker, *supra* note 16, at 342.

FISA is the product of constitutionally permissible congressional action.<sup>91</sup>

The seminal case articulating the Supreme Court doctrine governing the collision of presidential powers and congressional legislation is *Youngstown Sheet & Tube Co. v. Sawyer* ("Steel Seizure Case").<sup>92</sup> In the *Steel Seizure Case*, a potential strike at the nation's steel mills threatened to hamper steel production during the Korean War.<sup>93</sup> President Truman intervened and attempted to allow the Secretary of Commerce to run the mills for the United States.<sup>94</sup> The Court held that President Truman did not have authority to operate the mills on the nation's behalf.<sup>95</sup> Although Justice Black delivered the Court's plurality opinion, Justice Jackson's concurring opinion has provided the substantial precedent.<sup>96</sup> Justice Jackson created a trichotomy explaining the scope of presidential powers when Congress has authorized, failed to act in light of, or passed legislation incompatible with executive actions.<sup>97</sup> Commentators argue that the Bush administration's actions are a clear case of category-three

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<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., SWIRE, *supra* note 12, at 13.

<sup>93</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–83 (1952).

<sup>94</sup> *Id.* at 583.

<sup>95</sup> *Id.* at 588–89.

<sup>96</sup> SWIRE, *supra* note 12, at 13.

<sup>97</sup> *Youngstown*, 343 U.S. at 631–38.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. *Id.* at 636–38.

analysis as set forth in the *Steel Seizure Case*—where the president’s actions are incompatible with congressional will.<sup>98</sup> Congress has the authority to legislate in the area of foreign intelligence;<sup>99</sup> Congress enacted FISA in 1978 and has kept this aspect of FISA intact for the duration of the Act;<sup>100</sup> the President’s employment of the TSP is admittedly at odds with FISA’s mandates.<sup>101</sup>

Justice Jackson’s three category approach explains the Bush administration’s desire to find authorization for electronic surveillance of U.S. citizens in the AUMF. If the courts determine that the AUMF’s authorization to engage in the “incidents of waging war” includes electronic surveillance, the president’s surveillance program will be subject to category-one analysis. However, the majority of commentators,<sup>102</sup> and at least one federal judge,<sup>103</sup> agree that the issue warrants category-three analysis.

## B. THE FOURTH AMENDMENT

The Fourth Amendment ensures that Americans have the right to be free from unreasonable searches and seizures.<sup>104</sup> This amendment was intended to ensure that, unlike the “tyrannical invasions . . . endured by the colonists,”<sup>105</sup> Americans would be free from such “[e]xecutive abuses of the power to search.”<sup>106</sup> The practice of requiring probable cause to obtain warrants ensures that Americans are not subject to unreasonable search and seizure.<sup>107</sup>

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<sup>98</sup> SWIRE, *supra* note 12, at 14.

<sup>99</sup> H.R. Rep. No. 95-1283, pt. I, at 24 (1978).

<sup>100</sup> 50 U.S.C. § 1801 (2000).

<sup>101</sup> *White Paper*, *supra* note 17, at 28.

<sup>102</sup> See, e.g., Sims, *supra* note 9; Bradley, *supra* note 12.

<sup>103</sup> *ACLU I*, 438 F. Supp. 2d at 778.

<sup>104</sup> U.S. CONST. amend. IV.

<sup>105</sup> *Keith*, 407 U.S. at 328–29 (Douglas, J., concurring).

<sup>106</sup> *ACLU I*, 438 F. Supp. 2d at 774.

<sup>107</sup> *Id.*

Justice Powell's opinion in *Keith* emphasizes the importance of the Fourth Amendment, especially in cases of "national security."<sup>108</sup> Justice Powell noted that "[h]istory abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs."<sup>109</sup> Again, it was this very tendency in the British monarchy that spawned the Fourth Amendment.

The Fourth Amendment's requirement of judicially issued warrants protects Americans from baseless searches through review by an independent judiciary. Justice Powell's opinion in *Keith* persuasively explains the need for judicially ordered warrants,

The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.<sup>110</sup>

Thus, the neutral disposition of the judiciary provides a safeguard against unreasonable searches.

The TSP operates without this fundamental safeguard. However, that is not the only requirement the TSP circumvents. Commentators note that the Supreme Court permits searches only where there is both individualized suspicion and judicial oversight.<sup>111</sup> The Supreme Court has consistently held that open-ended warrants are constitutionally

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<sup>108</sup> *Keith*, 407 U.S. at 313.

<sup>109</sup> *Id.* at 313–14.

<sup>110</sup> *Id.* at 317 (citation omitted).

<sup>111</sup> Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, <http://www.nybooks.com/articles/18650>.



prohibited.<sup>112</sup> In *Ybarra v. Illinois*, the Court held that a warrant for a tavern did not provide law enforcement with the authority to search each individual who happened to be present at the bar during a raid.<sup>113</sup> This is effectively how the TSP works: the NSA is given *carte blanche* to investigate individuals who allegedly communicate with a person or organization associated with al Qaeda. As a result, the program ignores the Fourth Amendment safeguards established through centuries of legislation and legal precedent.

The current administration asserts that the TSP is consistent with the Fourth Amendment.<sup>114</sup> In *New Jersey v. T.L.O.*, Justice Blackmun's concurrence implied that there may be times where warrants are impractical.<sup>115</sup> The Department of Justice claims that "[f]oreign intelligence collection, especially in a time of war when catastrophic attacks have already been launched inside the United States, falls within the special needs context."<sup>116</sup>

Critics counter that the TSP is not excusable under the narrow "special needs" exception.<sup>117</sup> The "special needs" exception excuses only a narrow class of searches.<sup>118</sup> The searches generally occur in situations where the subject of the search has a limited right of privacy, and where obtaining a warrant may be impractical.<sup>119</sup> The TSP does not fit within these parameters. Presumably, some targets of these federal wiretaps are individuals in their homes and the special procedures established through FISA enable the NSA to quickly gain warrants. Moreover, special provisions in FISA enable the government to obtain *post facto* warrants.<sup>120</sup> Warrantless wiretapping

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<sup>112</sup> *Ybarra v. Illinois*, 444 U.S. 85, 92 (1979).

<sup>113</sup> *Id.*

<sup>114</sup> *Myth v. Reality*, *supra* note 61.

<sup>115</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

<sup>116</sup> *Myth v. Reality*, *supra* note 61.

<sup>117</sup> *Bradley*, *supra* note 111.

<sup>118</sup> *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

<sup>119</sup> *Id.*

<sup>120</sup> 50 U.S.C. § 1805(f) (2000).

has never been exempt under the special needs exception and it does not appear to fit within the courts' interpretation of the term.<sup>121</sup>

## C. STATE SECRETS, STANDING, AND THE FIRST AMENDMENT

While some aspects of the TSP are known, the details regarding its operations remain undisclosed. The Bush administration has kept the program's inner-workings secret by employing the state secrets privilege. By guarding the information, the government has hampered plaintiffs' ability to meet U.S. standing requirements. In an attempt to overcome this burden, plaintiffs have invoked the "chilling effect" doctrine to raise First Amendment claims.<sup>122</sup>

### 1. STATE SECRETS PRIVILEGE

The state secrets privilege permits the government to refrain from disclosing information that may be detrimental to national security. The U.S. government may invoke the state secrets privilege if disclosure would compromise military secrets.<sup>123</sup> While "the claim of privilege should not be lightly accepted, . . . the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."<sup>124</sup> In the context of espionage, military secrets consist of "NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst."<sup>125</sup>

In *ACLU v. National Security Agency*, the district court held that the executive branch properly exercised the state secrets privilege.<sup>126</sup> The district court reviewed materials submitted by the government *ex parte* and *in camera*.<sup>127</sup> After reviewing these materials, the court conceded that disclosure of the materials the Plaintiff sought would

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<sup>121</sup> Bradley, *supra* note 111.

<sup>122</sup> See *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 657 (6th Cir. 2007) [hereinafter *ACLU II*].

<sup>123</sup> *U.S. v. Reynolds*, 345 U.S. 1, 11 (1953).

<sup>124</sup> *Id.*

<sup>125</sup> *Halkin v. Helms*, 598 F.2d 1, 10 (D.C. Cir. 1978).

<sup>126</sup> *ACLU I*, 438 F. Supp. 2d at 764.

<sup>127</sup> *Id.*

have national security implications.<sup>128</sup> The Sixth Circuit subsequently affirmed the district court's decision to recognize the government's state secrets privilege.<sup>129</sup>

## 2. STANDING

Article III of the U.S. Constitution establishes the “case-or-controversy requirement” for the federal courts.<sup>130</sup> The requirement—known as “standing”—ensures that the federal courts will only hear cases that involve a genuine case or controversy.<sup>131</sup>

In *Lujan v. Defenders of Wildlife*, the Supreme Court established a three prong test to determine whether a plaintiff has standing: (1) “The plaintiff must have suffered an injury in fact”; (2) “There must be a causal connection between the injury and the conduct complained of”; and (3) “It must be likely . . . that the injury will be ‘redressed by a favorable decision.’”<sup>132</sup> A plaintiff's case must pass the *Lujan* test in order for the plaintiff to have standing to appear in federal court.

In *ACLU v. National Security Agency*, the district court determined that a group of individuals who were likely targets of the TSP had standing to sue the NSA.<sup>133</sup> The Plaintiffs established “injury in fact” through a First Amendment doctrine known as the “chilling effect.”<sup>134</sup> Essential to the Plaintiffs' claim was the assertion that their First Amendment right to communicate with “sources, clients, and potential witnesses” has been chilled as a direct result of the TSP.<sup>135</sup> Consequently, the harm done to the Plaintiffs “[was] a concrete, actual inability to communicate” with these sources and the increased costs that the Plaintiffs incurred to perform their professional duties in this

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<sup>128</sup> *Id.*

<sup>129</sup> *ACLU II*, 493 F.3d at 650–51.

<sup>130</sup> *Id.* at 659.

<sup>131</sup> *Id.*

<sup>132</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

<sup>133</sup> *ACLU I*, 438 F. Supp. 2d at 765–67.

<sup>134</sup> *Id.* at 768–69.

<sup>135</sup> *Id.* at 769.

chilled environment (e.g., traveling to the Middle East in order to securely communicate with clients).<sup>136</sup>

After determining that Plaintiffs suffered an injury in fact, the district court found that the Plaintiffs' case easily passed the second and third prongs of the *Lujan* test.<sup>137</sup> The court noted that the TSP targeted electronic communications between alleged agents of al Qaeda and parties in the United States, and that knowledge of this fact is the basis for the "chilled" communication alleged by the Plaintiffs.<sup>138</sup> Therefore, there was a direct causal connection between the injury and the offending conduct.<sup>139</sup> Finally, the court noted that a favorable decision for the Plaintiffs would remove this impediment to the exchange of communication between the Plaintiffs and their sources.<sup>140</sup>

On appeal, the Sixth Circuit vacated the district court's order and remanded the case for dismissal on the grounds that the Plaintiffs' case lacked standing.<sup>141</sup> The Sixth Circuit three-judge panel produced three separate opinions, with Judge Batchelder penning the leading opinion.<sup>142</sup> The three opinions expressed considerably different understandings of the current judicial doctrine governing standing and chilled speech.<sup>143</sup>

While Judge Batchelder was thoroughly unconvinced by the Plaintiffs' First Amendment injury-in-fact argument, she ultimately decided the issue on the causation and redressability prongs of the *Lujan* test.<sup>144</sup> She determined that the Plaintiffs' attempt to raise a First Amendment issue was nothing more than a ploy to avail themselves of the "First Amendment's relaxed rules on standing."<sup>145</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 770–71.

<sup>138</sup> *Id.* at 770.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 770–71.

<sup>141</sup> *ACLU II*, 493 F.3d at 648.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 666.

<sup>145</sup> *Id.* at 657.

Judge Batchelder employed simple and practical logic to dismantle the Plaintiffs' causation and redressability elements. She noted that wiretaps are secret; therefore, it was the act of secretly intercepting communications, and not the warrantless nature of the wiretaps, that caused the Plaintiffs' alleged injury.<sup>146</sup> Furthermore, forcing the NSA to abide by FISA procedures would not alleviate the threat to the Plaintiff of having communications intercepted by the NSA.<sup>147</sup> "The only way to redress the injury would be to enjoin *all* wiretaps . . . ."<sup>148</sup>

The Sixth Circuit's majority opinion declaring that the Plaintiffs' inability to establish that they were actually subjected to NSA wiretaps proved fatal to both their Fourth Amendment and their Separation of Powers claims.<sup>149</sup> To bring this particular Fourth Amendment claim, a plaintiff must establish that he was personally subjected to an illegal search or seizure.<sup>150</sup>

The opinion addressed the unpalatable dilemma that inevitably arises in this situation: with the government shielding its actions with the state secrets privilege, no plaintiff can raise Fourth Amendment or Separation of Powers claims.<sup>151</sup> The Sixth Circuit noted that the Supreme Court has addressed this predicament before and held, "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."<sup>152</sup> Rather, the court concluded that this is the very sort of political question that belongs in a public forum.<sup>153</sup> Additionally, the court wisely noted that it should not exceed its constitutional power to condemn the executive branch for exceeding its constitutional authority.<sup>154</sup>

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<sup>146</sup> *Id.* at 666–70.

<sup>147</sup> *Id.* at 670–73.

<sup>148</sup> *Id.* at 672.

<sup>149</sup> *Id.* at 673–75.

<sup>150</sup> *Id.* at 673.

<sup>151</sup> *See id.* at 675–76.

<sup>152</sup> *ACLU II*, 493 F.3d at 675 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

<sup>153</sup> *Id.* at 676 (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974)).

<sup>154</sup> *Id.* at 676.

To bring a FISA claim, a plaintiff must constitute an “aggrieved person” under the meaning of the statute.<sup>155</sup> The term “aggrieved person” is commensurate to the Fourth Amendment concept of standing.<sup>156</sup> Consequently, “for the same reason that [Plaintiffs] could not maintain their Fourth Amendment claim—they cannot establish that they are ‘aggrieved persons’ under FISA’s statutory scheme.”<sup>157</sup>

The concurring and dissenting opinions, written by Judges Gibbons and Gilman, respectively, centered on whether the “fear of harm” can constitute an injury-in-fact.<sup>158</sup> Judge Gibbons interpreted Supreme Court doctrine to “require that [P]laintiffs demonstrate that they (1) are *in fact subject* to the defendant’s conduct, in the past or future, and (2) have at least a reasonable fear of harm from that conduct.”<sup>159</sup> Judge Gilman, on the other hand, understood Supreme Court doctrine to simply require that defendants engage in unlawful conduct and Plaintiffs possess a reasonable fear of harm from this conduct.<sup>160</sup>

#### IV. RESPONSE TO THE PROGRAM

The response to the revelation of the TSP in The New York Times has been significant.<sup>161</sup> Several law schools across the nation have held symposia on the topic.<sup>162</sup> Members of Congress, from both parties, introduced a number of bills on the topic in 2006. In January

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<sup>155</sup> *Id.* at 682–83.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 683.

<sup>158</sup> *See id.* at 688–720.

<sup>159</sup> *Id.* at 689 (emphasis added).

<sup>160</sup> *Id.* at 699.

<sup>161</sup> As of February 2008, a Google search of “Terrorist Surveillance Program” produced over 100,000 hits.

<sup>162</sup> *See, e.g.,* War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century, Indiana Law School, Oct. 7, 2005, [http://www.law.indiana.edu/front/special/20051007\\_presidential.shtml](http://www.law.indiana.edu/front/special/20051007_presidential.shtml); The Most Dangerous Branch?, [http://web.archive.org/web/20070120104135rn\\_1/www.yalelawjournal.org/symposium2005/](http://web.archive.org/web/20070120104135rn_1/www.yalelawjournal.org/symposium2005/).

2007, The New York Times described the controversy as “13 months of bruising national debate.”<sup>163</sup>

Perhaps the most relevant response to the TSP is the recent litigation challenging the abandoned program’s legality. In August 2006, the American Civil Liberties Union won a judgment against the National Security Agency.<sup>164</sup> In the opinion, District Judge Taylor found the TSP unconstitutional in that it violated the Fourth Amendment and FISA.<sup>165</sup> The administration appealed the case, and the Sixth Circuit vacated the district court’s judgment in July 2007.<sup>166</sup> The Circuit Court’s decision turned on the Plaintiffs’ standing, rather than the constitutionality of the TSP.<sup>167</sup>

Another case, *Al-Haramain Islamic Foundation, Inc. v. Bush*, has made national headlines in 2007.<sup>168</sup> Al-Haramain sued the Bush administration for allegedly conducting warrantless surveillance on the organization and its directors.<sup>169</sup> The district court denied the government’s motion to dismiss or, in the alternative, for summary judgment, a decision from which the Defendants appealed.<sup>170</sup> The case appeared before the United States Court of Appeals for the Ninth Circuit on August 15, 2007, for oral arguments,<sup>171</sup> and the Court held that Plaintiffs could not establish standing because the state secrets privilege presently empowered the government to withhold

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<sup>163</sup> Lichtblau & Johnson, *supra* note 12.

<sup>164</sup> *ACLU I*, 438 F. Supp. 2d at 754.

<sup>165</sup> *Id.*

<sup>166</sup> *ACLU II*, 493 F.3d at 648.

<sup>167</sup> *Id.*

<sup>168</sup> Adam Liptak, *U.S. Defends Surveillance to 3 Skeptical Judges*, N.Y. TIMES, Aug. 16, 2007, <http://www.nytimes.com/2007/08/16/washington/16nsa.html>; Jennifer Granick, Commentary, *Nation’s Soul is at Stake in NSA Surveillance Case*, WIRED, Aug. 15, 2007, [http://www.wired.com/politics/law/commentary/circuitcourt/2007/08/circuitcourt\\_0815](http://www.wired.com/politics/law/commentary/circuitcourt/2007/08/circuitcourt_0815).

<sup>169</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1218.

<sup>170</sup> *Id.* at 1233.

<sup>171</sup> Liptak, *supra* note 168. The court’s docket, available at [http://www.ca9.uscourts.gov/ca9/calendar.nsf/FB7FD0C2F524ABAC88257336007DDE0A/\\$file/sf08\\_07.pdf?openelement](http://www.ca9.uscourts.gov/ca9/calendar.nsf/FB7FD0C2F524ABAC88257336007DDE0A/$file/sf08_07.pdf?openelement), reports that 06-36083 was heard following *Hepting v. AT&T Corp.* Presumably, this is *Al-Haramain Islamic Found., Inc. v. Bush*, but it is not evident from the docket.

evidence.<sup>172</sup> However, the Ninth Circuit remanded the case to the district court for a determination on the issue of whether FISA could preempt the state secrets privilege.<sup>173</sup>

## V. CONCLUSION

The president's revocation of the TSP has ended a brief but extremely controversial trip through constitutionally muddy waters. The Department of Justice's defense of the program failed to persuade a federal district court of the program's legality and constitutionality. A Republican Congress failed to pass legislation that would have excused the president's actions. The majority of legal scholars commenting on the program found it either illegal, unconstitutional, or both. Despite all these hurdles, the federal courts and Congress never halted the program's operation. The TSP may no longer operate, but the principal questions it provoked remain.

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<sup>172</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205 (9th Cir. 2007).

<sup>173</sup> *Id.* at 1206.